

## The Defendant's Case

### I. Whether to put on Witnesses

- A. Decide this, if possible, well ahead of trial. Your strategy may be considerably different if you *are* going to put on witnesses, in contrast to relying on attacking the prosecutor's case and acquiring facts to support a positive defense position by cross-examination.
- B. The only way to make this decision is to compare the best case you can put on *with* witnesses to the best case you can put on *without* witnesses.
  - 1. Look at all possible combinations of witnesses during preparation. Come up with the best case you can *with* witnesses.
  - 2. Come up with the best case possible *without* witnesses.
  - 3. Compare the two to determine which is most likely to result in the winning case.
- C. Factors favoring putting on witnesses
  - 1. Witnesses support the defense position which is the defense position most likely to win.
  - 2. Witnesses are credible impartial people.
  - 3. The testimony is necessary to support a certain defense and to provide the grounds for certain instructions.
  - 4. Corroboration may make witnesses credible who otherwise would not be.
  - 5. You may select only those witnesses who are credible and will testify to incidental factors supporting your case.
  - 6. Jurors like to hear both sides.
- D. Factors militating against putting on witnesses.
  - 1. What your witnesses say determines your defense. You may have a better defense than one they can supply.

2. You have more freedom in closing argument without witnesses.
3. Juries can usually sense if a witness is not telling the truth. The girlfriend, mother, wife, etc., who are the usual ones we are asked to put on, may be doing great harm when he or she is trying to help.
4. Even when the witnesses listed in paragraph 3 are telling the truth, they are subject to great skepticism by the jury and are not likely to be believed, or at best have no weight at all given to their testimony.
5. Most importantly, when only the D.A. has presented a case, you can put the *spotlight* on the D.A.'s case and hit hard at its weaknesses. The jury in deliberation will then put their own spotlight on the D.A.'s case and examine it carefully for weaknesses.
6. When both sides have presented a case (according to comments from jurors after verdict), juries almost inevitably compare the two sides and go with whichever side is stronger, with little or no regard for whether the D.A.'s case was proven beyond a reasonable doubt.
7. Your witnesses are subject to cross-examination by the D.A., and this may supply evidence against your defendant which would otherwise be unavailable to the D.A. In general, the less evidence in the case, the better for the defense.

**NOTE:** Competent trial attorneys and writers differ on the subject or the advisability of putting on a defendant or defense case. The attorney must decide on the basis of the situation existing in the particular case. Many attorneys feel a great compulsion to put on a defense case. It is the message here that one should not hesitate to proceed without a defense case, since simply attacking the prosecution can be very effective.

## **II. Putting on a Case without Witnesses**

- A. You have a case whether you put on witnesses or not.
- B. On voir dire or opening statement tell the jury that one can bring out facts by cross-examination which may make it unnecessary to call witnesses.
- C. By having a trial plan and therefore knowing what you will argue in closing, you know what to bring out on cross-examination which will support your defense.

**III. Whether you Plan a Defense Case or not, get Every Possible Fact Favorable to Defense from Prosecution Witnesses**

- A. This may make it unnecessary to put on defense.
- B. Facts that come from prosecution witnesses put the prosecutor in a position where it is difficult for the prosecutor to dispute the facts.
- C. If you put on a defense, prosecution witnesses may corroborate your witnesses.

**IV. If you are Going to put on Defense Witnesses or may do so, Prepare your Witnesses Before Trial**

- A. Prepare your witness for cross-examination by telling him:
  - 1. *Don't be afraid of the prosecutor.* If she tries to badger a witness, the jury's sympathy will lie with the witness. (This also helps the defendant understand why you don't badger the prosecution witnesses as, deep down, the prosecution wishes you would.)
  - 2. *Don't get angry with the prosecutor.* Anger makes it appear that the prosecutor hit a raw nerve. The witness may be firm, however.
  - 3. *Don't use slang.* The closer the witness comes to middle class standards, the greater the credibility.
  - 4. *Take the necessary time to answer and don't let the prosecutor control the pace by speeding up.*
  - 5. *If witness doesn't know, say "I don't know" or "I don't remember."* If not sure, say "I'm not sure." In other words, *tell it like it is*, and one is therefore less likely to get trapped.
  - 6. *Don't call the opposing witnesses liars.* The prosecutor may ask, "So, you're saying Detective Jones is a liar?" The witness can answer, "All I know is that I didn't do it, see it, hear it, etc."
  - 7. *Tell the truth.* The prosecutor may ask if the witness talked to you. Witness should say "yes" and on redirect, you ask the witness what you told him to say and he answers, "To tell the truth." Tell your witness about this ploy ahead of time.

8. *Give short answers on cross-examination.* Answer the question, but don't give them any more than necessary.
  9. In addition you may provide the witness with an instruction sheet such as is attached hereto as Appendix A (See "Chapter 8 - Direct Examination").
- B. After telling your witness the above, you be the prosecutor and give him a brief taste of cross-examination to get him used to it and see if he or she has any bad tendencies (such as trying to explain too much, belligerency, etc.) which can be corrected before taking the stand. You will also have a better idea of whether to use the witness.

## **V. Preparing the Witnesses Psychologically**

- A. It is not enough to prepare the witnesses factually.
- B. There are good witnesses and bad witnesses in the jury's eyes and that decision may well be on the basis of non-verbal communication.
1. Don't be afraid to discuss this thoroughly with the witness.
- C. Have the witness as informed as possible about what is going to happen to remove the natural fear of the courtroom as much as possible.
- D. Know what feelings you want conveyed during the testimony of that witness and decide how to achieve that.
1. Feelings must be genuine. Probably the best way to evoke certain feelings on the part of a witness is to have and convey those same feelings yourself.
- E. Note feelings the witness displays such as wanting to help, aggression, anger, reticence, etc. Tell the witness about this and work with him or her to overcome that which will hurt.
1. You *cannot* change someone simply by telling him to behave in a certain way in the courtroom.
  2. You cannot change a person overnight but you can help that person show the best side of his personality when in Court. Help him "put his best foot forward."

3. Be sure that whatever coaching takes place between attorney and witness there can in no way be any subjective interpretation of that meeting other than “*tell the truth.*”

## **VI. Putting on the Defendant**

- A. This is a very important decision. If the defendant takes the witness stand, he becomes central to the case. The *truth* of his version and his *credibility* assume great importance in the jury’s decision on guilt or innocence.
- B. The defendant’s version becomes your positive defense position. It may be best or you may be able to do much better on the basis of facts from other witnesses.
- C. The defendant’s testimony may be necessary to get the defense before the jury.
- D. Do not be afraid to proceed without the defendant taking the stand.
  1. You can overcome the jury’s desire to hear the defendant testify. Put the spotlight on the prosecution’s case and its weakness and on an issue and the facts gathered otherwise supporting your side of that issue.
- E. If the defendant is going to be untruthful or you feel he is untruthful, probably the jury also will feel he is untruthful and convict.
  1. If this is so, it is not only the ethical thing to do but the best thing to do strategically to proceed without his testimony.

## **VII. Preparing the Defendant Psychologically**

- A. The consideration mentioned in V above as to witnesses in general applies to the defendant but the psychological factors are even more important as to the defendant.
- B. The jury is unlikely to be fooled as to the feelings of the defendant.
- C. If a defendant feels aggressive or whatever other trait is involved in the crime charged, his chances of conviction are substantially increased.
- D. You cannot expect to change the emotional makeup formed during a lifetime, but you can help the defendant put his best foot forward.

1. Start working with him long before the trial.
2. Tell the defendant about the psychological factor.
3. Tell the defendant he cannot just act a certain way but must *feel* non-aggressive, sorry, etc., and that he must work on this over a period of time.
4. If the defendant is not one who the jury fears will commit crimes in the *future*, chances of acquittal increase substantially.
5. If the defendant comes on as victim of circumstances in being charged with something he did not do but is not mad at the world because of it, he is much more likely to win.
6. In short, if you coach the defendant to be a better human being, he is more likely to prevail.